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US WATS, INC. and USW CORP., Plaintiffs, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendant.

US WATS, INC. v. AT&T

CIVIL ACTION NO. 93-1038

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1994 U.S. Dist. LEXIS 4074

April 5, 1994, Decided

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FOR AMERICAN TELEPHONE AND TELEGRAPH COMPANY, DEFENDANT: DAVID H. PITTINSKY, BALLARD, SPAHR, ANDREWS AND INGERSOLL, PHILA, PA.

JUDGES: Yohn, Jr., J.

OPINIONBY: WILLIAM H. YOHN, JR.

OPINION: MEMORANDUM AND ORDER

Yohn, J.

Pending before the court is the motion of defendant American Telephone and Telegraph Company ("AT&T") to dismiss the fifth claim of the second amended complaint (the "fifth claim") of plaintiffs U.S. Wats, Inc. and USW Corp. (collectively "US Wats") pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted and to strike the sixth claim of the second amended complaint (the "sixth claim") pursuant to Federal Rule of Civil Procedure 12(e) for failure to comply with the court's previous orders for a more definite statement. For the reasons discussed herein, the court will deny AT&T's motion to dismiss the fifth claim and grant its motion to strike the sixth claim.

BACKGROUND

In the fifth claim, US Wats avers that AT&T's refusal to comply with US Wats' instructions to transfer some of US Wats' end-user customers from a software defined network ("SDN") held in the name of a company called International Telecom Group, Inc. (the "ITG SDN") to another held by US Wats (the "US Wats SDN"), despite AT&T's knowledge that US Wats and not International Telecom Group, [*2] Inc. ("ITG") held Letters of Agency for those customers, breached an implied-in-fact contract between US Wats and AT&T. (Second Am. Compl. PP 79-83.) AT&T originally sought to dismiss US Wats' breach of contract claim on the ground that it was barred by the "filed tariff doctrine." By a Memorandum and Order of June 9, 1993 ("Mem. and Order 1") and one dated August 27, 1993 ("Mem. and Order 2") the court twice deferred consideration of the merits of AT&T's filed tariff doctrine argument and instead ordered US Wats to file a more definite statement of its breach of contract claim. US Wats has now done so and once again the court is confronted with AT&T's contention that the filed tariff doctrine warrants dismissal of the fifth claim. Before considering this argument, however, a brief review of the pertinent portions of US Wats' allegations is in order. Those allegations, as averred in the second amended complaint, are summarized as follows: n1

n1 The allegations contained in US Wats' second amended complaint are recounted only to the extent that they pertain to the court's resolution of AT&T's motion to dismiss the fifth claim and to strike the sixth claim. Of course, in reviewing AT&T's motion to dismiss the fifth claim, the court must accept as true all of US Wats' allegations and all reasonable inferences that can be drawn therefrom, and must view them in the light most favorable to US Wats. See *Rocks v. Philadelphia, 868 F.2d 644, 645 (3d*

Cir. 1989).

[*3]

In or about 1985, AT&T filed tariffs with the FCC for a class of long distance voice telecommunications services known as software defined networks ("SDNs") which were designed to offer a competitive alternative to private line networks for large companies by providing a steep price discount in exchange for a substantial commitment of minimum monthly usage. (Second Am. Compl. P 7.) Some time thereafter, companies such as US Wats -- common carriers that engaged in the business of reselling long distance voice telecommunications service -- began to contract with AT&T as SDN customers. (Id. P 8.) These commercial resellers, as SDN customers of AT&T, are able to enroll end-user customers in the SDN program, bill such customers directly for their telephone usage, and retain as profit the difference between the amount they charge end-users and the amount AT&T charges them as the SDN customer. (Id. P 14.) This practice undercuts AT&T's more profitable long-distance programs since the commercial resellers are able to charge individual end-user customers less than such end-users would pay in a direct relationship with AT&T under those programs. (Id. PP 10, 27-28.)

Around July 1, [*4] 1990, ITG and US Wats entered into an agreement pursuant to which ITG purported to grant US Wats an exclusive license for the use of one of the approximately 20 SDNs then available to ITG (the "ITG SDN"). (Id. P 18.) US Wats avers that AT&T knew of this agreement between ITG and US Wats because, among other reasons, US Wats paid AT&T directly for the monthly usage charges associated with the ITG SDN. (Id. P 20.) On or about March 20, 1991, AT&T advised US Wats that ITG had not obtained AT&T's consent to license the ITG SDN to US Wats and that ITG had no authority to grant a license to US Wats. (Id. P 35.)

In or about April, 1991, US Wats commenced suit against ITG in this district seeking injunctive relief and damages in connection with the granting of the alleged license from ITG to US Wats and the transfer of US Wats' customers to the ITG SDN. (Id. PP 37-38.) In or about November, 1991, US Wats instructed AT&T to transfer approximately 675 US Wats customer accounts from the ITG SDN to an SDN which had been obtained by US Wats from AT&T (the "US Wats SDN") in or about June, 1989. (Id. P 39.) AT&T refused to honor US Wats' transfer instructions despite its knowledge [*5] that US Wats rather than ITG held Letters of Agency from each of the 675 US Wats customers authorizing and empowering US Wats to select and provide long distance service for such customers. (Id. PP 40-41; see also id. P 22.)

In or about June, 1992, the suit between US Wats and ITG was settled pursuant to an agreement which provided, inter alia, that ITG would release and authorize the transfer of the accounts on the ITG SDN to the US Wats SDN. n2 (Id. P 46.) US Wats advised AT&T of this settlement and again instructed AT&T to transfer the accounts on the ITG SDN to the US Wats SDN. (Id. P 47.) AT&T refused to comply with this instruction and continues "to hold some of US Wats' customers hostage on [the ITG SDN]." (Id. P 48.) US Wats contends that this refusal to transfer end-user accounts from the ITG SDN to the US Wats SDN breached an implied-in-fact contract between US Wats and AT&T. (Id. PP 79-83.)

n2 US Wats does not precisely designate the accounts to which it refers; the court assumes that such accounts are the equivalent of the aforementioned 675 US Wats customer accounts contained on the ITG SDN.

[*6]

DISCUSSION

A. Motion to Dismiss the Fifth Claim

AT&T contends that US Wats' breach of implied-in-fact contract claim is precluded as a matter of law by the "filed tariff doctrine." For the reasons discussed below, the court disagrees and consequently will deny AT&T's motion to dismiss the fifth claim.

The Communications Act of 1934, as amended, requires common carriers, including long-distance telephone carriers such as AT&T, to file and maintain a schedule, or tariff, of contractual terms and conditions with the FCC. *47 U.S.C. § 203*(a)-(b). A tariff filed with the FCC must set forth the carrier's charges, classifications, practices, and regulations, *47 U.S.C. § 203*(a), and is subject to FCC regulation and approval. Id. § 203(b)(2).

The filed tariff doctrine (more commonly referred to as the "filed rate doctrine") n3 "forbids a regulated entity [from charging] rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall ("Arkla"), 453 U.S. 571, 577, 101 S. Ct. 2925, 2930, 69 L. Ed. 2d 856 (1981);* [*7] see also *Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 110 S. Ct. 2759, 111 L. Ed. 2d 94 (1990); Taffet v. Southern Co., 967 F.2d 1483, 1488-90* (11th Cir.) (en banc), cert. denied, ___ U.S. ___, *113 S. Ct. 657, 121 L. Ed. 2d 583 (1992); H.J., Inc. v. Northwestern Bell Telephone Co.*

("H.J."), 954 F.2d 485, 488 (8th Cir.), cert. denied, ___ U.S. ___, *112 S. Ct. 2306, 119 L. Ed. 2d 228 (1992); Marco Supply Co. v. AT & T Communications, 875 F.2d 434, 436 (4th Cir. 1989); 47 U.S.C. § 203*(c). n4

n3 Both terms are used interchangeably throughout this opinion.

n4 In full *47 U.S.C. § 203*(c) provides:

> No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) **refund** or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

[*8]

A particularly perspicacious discussion of the origin and historical development of the doctrine is found in *Wegoland, Ltd. v. NYNEX Corp., 806 F. Supp. 1112, 1113-16 (S.D.N.Y. 1992)*. There, the court identified "two companion principles [that] lie at the core of the filed rate doctrine: first, that legislative bodies design agencies for the specific purpose of setting uniform rates, and second, that courts are not institutionally well suited to engage in retroactive rate-setting." *Id. at 1115*. See also *H.J., 954 F.2d at 488* ("The purpose of the filed rate doctrine is to: (1) preserve the regulating agency's authority to determine the reasonableness of rates; and (2) insure that the regulated entities charge only those rates that the agency has approved or been made aware of as the law may require") (citing *Arkla, 453 U.S. at 577-78, 101 S. Ct. at 2930-31*).

In Wegoland, the court designated these two core principles as the "anti-discrimination strand" and the "non-justiciability strand" respectively. *Wegoland, 806 F. Supp. at 1115*. **[*9]** In a typical discrimination case, the plaintiff is a customer of a regulated carrier seeking to avoid payment of the filed rate on the ground that it was quoted some lower rate by the regulated carrier. Id. In such a situation, courts have consistently held that a regulated carrier must charge the tariff rate established with the appropriate regulatory agency, even if it has quoted or charged a lower rate to a customer. See, e.g., *Marco Supply Co., 875 F.2d at 436*. Indeed, recently the Supreme Court forcefully reaffirmed this principle, invalidating the Interstate Commerce Commission's policy of relieving a shipper of its obligation to pay the filed rate where it had privately negotiated a lower rate with a motor common carrier. See *Maislin, 497 U.S. at 130, 110 S. Ct. at 2768* ("By refusing to order collection of the filed rate solely because the parties had agreed to a lower rate, the ICC has permitted the very price discrimination that the [Interstate Commerce] Act by its terms seeks to prevent").

Moreover, courts have adhered to the anti-discrimination principle even where carriers **[*10]** had allegedly made fraudulent representations to aggrieved customers regarding the applicable tariff rates, holding that the filed rate doctrine bars claims of fraud based upon a carrier's concealment or misrepresentation of a filed rate. See *Marco Supply Co., 875 F.2d at 436* (allegations of willful misrepresentation of rates not actionable); *Missouri Pacific Ry. v. Rutledge Oil Co., 669 F.2d 557, 558-59 (8th Cir. 1982)* (counterclaim for fraud based on misleading advice not actionable "where the result would be a rate **preference**"); *Consolidated Freightways v. Terry Tuck, Inc., 612 F.2d 465, 466* (9th Cir.) (counterclaim for fraud predicated on alleged misquotations of tariffs not actionable), cert. denied, *447 U.S. 907, 100 S. Ct. 2990, 64 L. Ed. 2d 856 (1980); Aero Trucking, Inc. v. Regal Tube Co., 594 F.2d 619, 622 n.1 (7th Cir. 1979)* (alleged fraudulent misrepresentations by carrier did not alter "[the Motor Carrier] Act's purpose of enforcing rate uniformity"); *Illinois Central Gulf Ry. v. Golden Triangle Wholesale Gas Co., 586 F.2d 588, 592 (5th Cir. 1978)* **[*11]** (alleged fraudulent inducement that tariff would not apply to lease rejected because "Interstate Commerce Act was designed to provide uniformity in charges for services, and, thereby, to prevent rate discrimination").

By contrast, in a typical justiciability case, the plaintiff contends that the tariff rate itself was unreasonably high due to some alleged wrongdoing on the part of the common carrier and asks the court to retroactively determine a reasonable rate by assessing how much the defendants had inflated the rate through their alleged wrongdoing. *Wegoland, 806 F. Supp. at 1115*. In such a case, "the filed rate doctrine prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in is-

sue." *H.J., 954 F.2d at 488*, citing *Arkla, 453 U.S. at 578-79, 101 S. Ct. at 2930-31*. Adhering to the non-justiciability principle, most courts have held that the filed rate doctrine mandates dismissal of any claim that challenges a tariffed rate because regulatory agencies' primary jurisdiction over **[*12]** the reasonableness of rates must be preserved. n5

n5 See *Keogh v. Chicago & Northwestern Ry., 260 U.S. 156, 43 S. Ct. 47, 67 L. Ed. 183 (1922)* (filed rate doctrine precluded plaintiff's antitrust action alleging that defendant carrier had conspired to fix the tariffed rate for transporting freight in violation of the Sherman Act because any calculation of damages would have required a determination of what a reasonable rate would have been but for the alleged conspiracy); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 106 S. Ct. 1922, 90 L. Ed. 2d 413 (1986)* (Supreme Court refuses to overrule or modify Keough, holding that no departure from the filed rate doctrine was warranted even where utilities had allegedly illegally conspired among themselves to fix rates at an inflated level and then submitted those inflated rates as "reasonable" rates to the rate-setting agency without disclosing that such rates were reached as the result of a conspiracy); *Taffet v. Southern Co., 967 F.2d 1483* (11th Cir.) (en banc) (filed rate doctrine applies even where regulated entity has defrauded administrative agency to obtain approval of filed rate; thus, utility customers' RICO action against utilities which had allegedly obtained approval of unreasonably high rate based upon fraudulent misrepresentations to state rate-setting commission was precluded by the filed rate doctrine because no right to a reasonable rate exists independently of agency action), cert. denied, ___ U.S. ___, *113 S. Ct. 657, 121 L. Ed. 2d 583 (1992); H.J., Inc. v. Northwestern Bell Telephone Co., 954 F.2d 485* (8th Cir.) (filed rate doctrine barred RICO class action brought by purchasers of telecommunications goods and services alleging that telephone company bribed members of relevant rate-setting agency in order to influence those officials' determination of telephone rates), cert. denied, ___ U.S. ___, *112 S. Ct. 2306, 119 L. Ed. 2d 228 (1992); Wegoland, Ltd. v. NYNEX Corp., 806 F. Supp. 1112 (S.D.N.Y. 1992)* (RICO and state claims based on allegations that ratepayers were forced to pay higher rates because telephone companies and subsidiaries fraudulently induced state and federal regulatory commissions into approving higher rates by reporting and paying higher costs than necessary barred by the filed rate doctrine).

[*13]

In this case, AT&T claims that the filed tariff doctrine precludes US Wats' breach of implied-in-fact contract claim because "AT&T cannot owe US Wats any non-tariff obligation." (AT&T Mot. to Dismiss at 7.) According to AT&T, because "the filed Tariff and only the filed Tariff governs the relationship between AT&T and US Wats . . . . if the obligation is not in the tariff, it cannot be 'implied', in fact or in law." (Id. at 6-7.) In other words, AT&T contends that since its alleged duty to transfer end-users from the ITG SDN to the US Wats SDN is not contained in the applicable tariff, such a duty therefore cannot exist as a matter of law and the fifth claim must accordingly be dismissed.

The court does not agree. AT&T interprets the filed tariff doctrine too broadly. Its contention that "the filed tariff doctrine precludes the existence of any contract, whether express or 'implied in fact,' other than the tariff," (AT&T Resp. to Pl.'s Supplemental Mem. at 4), is not bolstered by the case-law cited in support thereof: *Farley Transp. Co., Inc. v. Santa Fe Trail Trans. Co., 778 F.2d 1365 (9th Cir. 1985)* and *TADMS, Inc. v. Consolidated Freightways, 619 F. Supp. 385 (C.D. Cal. 1985)*. **[*14]**

Both cases merely reiterated the axiomatic anti-discrimination principle. See *Farley Transp. Co., Inc., 778 F.2d at 1372* ("A duly published tariff is binding on the parties and has the force of law. A tariff must be applied equally to all since any deviation from the lawful rate would involve either undue **preferences** or unjust discrimination. Application of a published tariff is required regardless of the intentions of the parties or the equities existing between carrier and shipper") (citations omitted); *TADMS, 619 F. Supp. at 390* ("It is well settled that a tariff has the force of law and that a shipper and a carrier are bound by its terms and cannot vary those terms. . . . The published tariff must be followed even if a shipper was quoted a different price by a carrier, or even if there exists a contract providing for shipment at a different rate or price") (citations omitted). Neither case embraced the broader proposition that no contract can exist other than the tariff. Likewise, Brookman & Brookman P.C. v. MCI Telecom. Corp., 1991 WL 107421 (S.D.N.Y. June 12, 1991) cannot fairly be said to stand for the proposition **[*15]** that "a contract cannot be legally binding if there is a filed tariff." (AT&T Mot. to Dismiss at 5.) Rather, the court in Brookman & Brookman only held that the plaintiff was foreclosed by the filed tariff doctrine from claiming that a contract existed which obligated defendant MCI to charge rates

inconsistent with its validly filed tariff. Id.

The Supreme Court "has not recently expressed an inclination to extend the filed rate doctrine beyond contexts clearly implicating the anti-discrimination or non-justiciability rationales for the rule." *Gelb v. American Tel. & Tel. Co., 813 F. Supp. 1022, 1028 (S.D.N.Y. 1993)*. In the instant case, this court is not persuaded that US Wats' breach of implied-in-fact contract claim falls "within the factual predicates upon which the filed rate doctrine developed." *Id. at 1029*. US Wats neither challenges its liability for charges associated with the tariff nor attacks the reasonableness of the applicable tariff. Its breach of implied-in-fact contract claim thus implicates neither the anti-discrimination strand nor the non-justiciability strand of the filed tariff doctrine. n6 The **[*16]** court's adjudication of this claim will neither result in rate discrimination nor embroil the court in a dispute over the reasonableness of AT&T's charges in contravention of the FCC's rate-making authority. Therefore, since "the focus for determining whether the filed rate doctrine applies is the impact the court's decision will have on agency procedures and rate determinations," *H.J., 954 F.2d at 489*, the filed rate/tariff doctrine does not bar US Wats' breach of implied-in-fact contract claim.

n6 AT&T also contends that the filed tariff doctrine precludes US Wats' contract claim because AT&T was entitled to refuse to transfer the end-user accounts pursuant to the terms of the following tariff provisions:

2.5.3 Payment of Charges - Payment for LDMTS [Long Distance Message Telecommunications Services] is due upon presentation of the bill. LDMTS may be denied for nonpayment of a bill . . . .

2.9.3 Nonpayment of Charges - The Company [AT&T] may deny and/or restrict LDMTS for nonpayment of charges due as specified in section 2.5.3 (Payment of Charges) preceding. . . .

(AT&T Mot. to Dismiss at 8.) According to AT&T, because Count One of AT&T's counterclaim alleges that "US Wats had not paid its bills at the time it made its request [to transfer the end-user accounts] and continues to refuse to pay its bills for telecommunications service," (id.), AT&T was permitted under the terms of the tariff to refuse to transfer the end-user accounts, and US Wats' contract claim is therefore barred by the filed tariff doctrine.

This contention lacks merit. US Wats disputes AT&T's contention that it refused to transfer the end-user accounts because of US Wats' alleged non-payment, contending instead that "AT&T maintained that it had no obligation to honor US Wats' transfer instructions because ITG, rather than US Wats, was AT&T's so-called customer of record for [the ITG SDN]." (Second Am. Compl. P 80.) In need hardly be stated that, for the purposes of reviewing AT&T's motion to dismiss, the court must accept US Wats' allegations as true and cannot rely on the unproven allegations contained in AT&T's counterclaim.

[*17]

Moreover, the above basis for this court's decision is consistent with the reasoning employed and the results reached in other cases dealing with the filed rate/tariff doctrine. For example, in Wegoland, the court noted that the filed rate doctrine was "arguably inapplicable" in cases where "courts are not asked to determine what a reasonable rate would have been." *Id., 806 F. Supp. at 1116 n.1*. Likewise, in *Nordlicht v. New York Telephone Co., 617 F. Supp. 220 (S.D.N.Y. 1985)*, aff'd, *799 F.2d 859 (2d Cir. 1986)*, cert. denied, *479 U.S. 1055, 107 S. Ct. 929, 93 L. Ed. 2d 981 (1987)*, the district court noted that the filed tariff doctrine "provides no protection from lawsuits not directly connected with rates." *Id., 617 F. Supp. at 226 n.4* (citing *Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973))*. See also *H.J., 954 F.2d at 490* (filed rate doctrine arguably inapplicable **[*18]** where claim "[does] not attack the rate itself and [does] not require the court to 'second-guess' the rate-making agency"); *Gulf States Utilities Co. v. Alabama Power Co., 824 F.2d 1465, 1472 (5th Cir. 1987)* (stating that although contracts to purchase electricity might be set aside if plaintiff could demonstrate fraudulent inducement because such a remedy "would not interfere with the [federal agency's] rate-making powers," such contracts could not be set aside "on the theory that [the defendant's] rates are too high") (footnote and citation omitted), opinion amended on other grounds, *831 F.2d 557 (5th Cir. 1987); Litton Systems, Inc. v. American Tel. & Tel. Co., 700 F.2d 785, 820 (2d Cir. 1983)* (distinguishing Keogh and holding the filed rate doctrine inapplicable where the plaintiffs did not call upon the court to even indirectly determine what a reasonable rate would have been), cert. denied, *464 U.S. 1073, 104 S. Ct. 984, 79 L. Ed. 2d 220 (1984); City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1179 (8th Cir. 1982)* **[*19]** (award of antitrust damages for alleged creation and maintenance of anticompetitive price squeeze did not conflict with regulatory agencies' authority to oversee

rates because the plaintiff did not challenge those agencies' reasonableness determinations), cert. denied, *459 U.S. 1170, 103 S. Ct. 814, 74 L. Ed. 2d 1013 (1983); American Tel. & Tel. Co. v. NOS Communications, Inc., 830 F. Supp. 225, 227 (D.N.J. 1993)* (in suit to recover tariff charges from defendant SDN reseller, summary judgment for plaintiff AT&T precluded where defendant did not "dispute the rates it was charged but, rather, claimed that the services provided were not those which AT & T had an obligation to perform under the tariff").

In sum, the court concludes that the filed rate/tariff doctrine does not bar US Wats' breach of implied-in-fact contract claim because its claim implicates neither the non-justiciability strand nor the anti-discrimination strand of the doctrine. At this stage of the proceedings, there is no reason to believe that the court's resolution of US Wats' contract claim will either interfere with the FCC's **[*20]** authority over the reasonableness of AT&T's rates or result in a rate **preference** for US Wats. n7 Accordingly, AT&T's motion to dismiss the fifth claim is denied.

> n7 AT&T of course remains free to explain to the court, in a motion for summary judgment, how the court's adjudication of US Wats' contract claim -- including any possible award of monetary damages -- might implicate either strand of the doctrine. Moreover, in any such motion, AT&T may also wish to elaborate upon the basis of its contention that the sections of the applicable tariff which allow AT&T to deny and/or restrict LDMTS service for nonpayment of bills entitled AT&T to refuse to transfer end-user accounts from the ITG SDN to the US Wats SDN. See infra at n.6. While the court is somewhat doubtful that the transfer of end-users is in fact the type of LDMTS service that AT&T was permitted to deny and/or restrict for nonpayment, the court will reserve resolution of that question for a later date.

B. Motion to Strike the Sixth Claim

In the sixth **[*21]** claim, US Wats avers that AT&T's refusal to transfer end-user customers from the ITG SDN to the US Wats' SDN violated federal common law. (Second Am. Compl. P 85.) Once again, however, as was the case with both its original complaint and its first amended complaint, US Wats has failed to specify the theory or doctrine of federal common law under which it claims relief.

Previously, when reviewing the federal common law claim contained in US Wats' original complaint, the court noted that:

> "Federal common law" is not a legal theory under which relief can be claimed; it is an entire body of law, equivalent in its lack of specificity to "federal statutory law." Plaintiff has understood that it must cite the specific sections of federal statutory law under which it claims relief; it must do the equivalent for federal common law and state the legal theory or doctrine of such law under which it claims relief.

(Mem. and Order 1 at 2.) Unfortunately, despite the court's guidance, US Wats' first amended complaint was "no more specific as to the theory or doctrine of federal common law under which it claims relief" than its original complaint had been. (Mem. and Order 2 at 2.) Consequently, **[*22]** the court struck US Wats' federal common law claim but gave it "one more chance to amend its complaint," advising US Wats that if it did "not take this opportunity to cure the defect[] . . . [then] the claim[] will be dismissed." (Id.)

US Wats has not cured this defect; its second amended complaint again fails to identify a theory of recovery under federal common law. Accordingly, the court will strike the sixth claim of the second amended complaint pursuant to Federal Rule of Civil Procedure 12(e) for failure to comply with the court's previous orders for a more definite statement.

CONCLUSION

For the foregoing reasons, AT&T's motion to dismiss the fifth claim is denied and its motion to strike the sixth claim is granted. An appropriate order follows.

ORDER

AND NOW, this 5th day of April, 1994, upon consideration of defendant's motion to dismiss the fifth claim of plaintiffs' second amended complaint and to strike the sixth claim of plaintiffs' second amended complaint, and the briefs thereto, it is hereby ORDERED as follows:

1. With regard to the fifth claim of the second amended complaint, defendant's motion is DENIED.

2. With regard to the sixth claim of the second **[*23]** amended complaint, defendant's motion is GRANTED and the sixth claim of the second amended complaint is stricken for failure to comply with the court's previous orders for a more definite statement.

William H. Yohn, Jr., Judge

CERTIFICATE OF SERVICE

I, Roberta Schrock, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 23rd day of February, 1995, caused a copy of the foregoing document to be served on the following by first-class U.S. mail, postage prepaid:

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